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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1982

No.

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HARRY RONALD FRANS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the court below erred in disregarding the requirement that the trier of the facts articulate on the record that the prosecution has met the constitutional standard of burden of proof beyond a reasonable doubt.

2. Whether the court below erred in disregarding the requirement that the trier of the facts must make a specific finding on the record of the proof of venue and general findings on the record as to each separate element of the crime of conspiracy as charged.

3. Whether the lower court erred in determining that the competent evidence produced at trial was sufficient to prove a conspiracy.

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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1982

No.

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| HARRY RONALD FRANS, | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| against | ) |
| | ) |
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Respondent. | ) |

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Petitioner, Harry Ronald Frans, prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Seventh Circuit in the case of U.S. v Harry Ronald Frans, which was decided on January 6, 1983, and rehearing denied on March 9, 1983.

## OPINION BELOW

The decision of the Court of Appeals which petitioner seeks to review, dated January 6, 1983, is reported in 697 Fed 188. It affirms on direct appeal, United States District Court, Eastern District of Wisconsin, judgment of guilty, dated March 16, 1982. Petitioner was sentenced to serve fifteen (15) months imprisonment. It is reproduced as Appendix A. A petition for rehearing was filed and denied by the Court of Appeals on March 9, 1983. It is reproduced as Appendix B.

## JURISDICTION

The jurisdiction of this court rests on 28 USC 1651(a). The decision of the Court of Appeals was handed down on January 6, 1983, and rehearing was denied on March 9, 1983.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment is involved Appendix (D) 4a

The statutes involved are Title 28 USC Sec. 1651 Appendix (C) 3a ; 18 USC 371 (Conspiracy to commit offense or to defraud United States) and 18 USC 2314 (Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting. Appendix (E) 5a. and Appendix (F) 6a.

## STATEMENT OF THE CASE

This is an appeal from an affirmance by the Court of Appeals, Seventh Circuit, of a judgment of conviction entered by the trial court, after trial by court, finding the the petitioner, Harry Ronald Frans, guilty of conspiracy to transport stolen goods in interstate commerce, contrary to 18 USC 371 and 18 USC 2314.

On September 21, 1981, Harry Ronald Frans, Daryl Kilmer and James J, Arrajj, Jr. were charged with the above offense in a criminal complaint. On September 22, 1981, petitioner Frans and alleged co-conspirator Arrajj were indicted by a grand jury.

On December 9, 1981, Arrajj moved for a severance of his trial from that of his co-defendant, Harry Ronald Frans. On January 6, 1982, the trial court ordered the trial severed.

On December 28, 1982, after a one day court trial, Frans was found guilty of conspiracy as charged. On March 16, 1982, Frans was sentenced to fifteen (15) months imprisonment. The sentence was stayed pending appeal.

At the close of the Government's case, the, then, attorney for Frans stated: "I move to make the appropriate motions and I'll renew my right, I'll preserve my right to make those at the end, and the motion to dismiss." The court denied these motions. At the close of all of the testimony, counsel for the defendant made a motion for judgment of acquittal, arguing that the government had not established venue, nor the existence of a conspiracy, which would involve Frans to transporting something in interstate commerce and that there were no overt acts shown in furtherance of such transportation in interstate commerce such as to create federal jurisdiction.

The court, without reference to the motion for judgment of acquittal and without a decision on jurisdiction (venue), found and adjudged the defendant Frans guilty of the offense charged in the indictment, stating the evidence was overwhelming and that the defendant committed "all the acts necessary" and "the conspiracy is proven beyond any questionable doubt."

Frans filed his appeal in the court below and same was denied. Appendix A, and likewise, petitioner's application for re-hearing, Appendix B, was also denied. Mandate issued from the Court of Appeals for the Seventh Circuit. Stay applications in lower courts have been denied.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

This case presents questions of critical importance as petitioner's immunities, rights and privileges and equal protection implicit in the concept of ordered liberty protected

against arbitrary action, as is procedurally and substantively offered by the Fourteenth Amendment. This has been violated and denied to petitioner without due process of law. The continuing vitality of the principle that petitioner, at all times, under the Fourteenth Amendment was entitled to equal treatment and equal protection under the law. The Constitution protects him from any deprivations without due process of law. A review of the cases finds the court below rendering a decision in conflict with decisions of its own, and other courts of appeal, on the same matter and has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

**1. The trier of the fact must articulate on the record the constitutional standard of proof of guilt beyond a reasonable doubt.**

The court below in affirming the trial court's finding to the effect that "the conspiracy is proven beyond any questionable doubt" is legally insufficient to sustain a verdict or judgment of "guilty".

The trial court, in making his finding that the conspiracy is proven beyond any questionable doubt, deviated from the constitutional and required standard. The burden of persuasion incumbent upon the government is no less in a case tried without a jury. U.S. v Cooper, CA Pa 1977, 567 F2d 252.

Reasonable doubt does not mean that every doubt has been excluded; rather, it is that degree of moral certitude based on convincing reason and excluding all doubts as to the existence of a different conclusion based on reasons. Genova v State, 91 Wis2d 595, 283 NW2d 483. Traditionally, the judge as the fact finder must, using the correct legal principles, determine whether or not he was convinced the government had established each

element beyond all reasonable doubt. U.S. v Pinner, CA Fla 1977, 561 F2d 1203.

The very minimum of requirements for due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. USCA Const Amend 5, 14; U.S. v Read, CA Ill (1981), 658 F2d 1225.

If doubt means to waiver or fluctuate in opinion, to be in uncertainty, respecting the truth or fact, to be determined and questionable means doubtful, then what is the meaning of questionable doubt? It certainly does not mean "reasonable doubt". Other meanings assigned to "questionable" are "uncertain", "disputable" and "suspicious". Will this court be able to determine from the court's finding whether beyond any questionable doubt meant beyond any uncertain doubt; beyond any disputable doubt; beyond any suspicious doubt, or all of the above? The standard of proof beyond reasonable doubt is applied to each

element of proof in a conspiracy trial. It also applies to a co-conspirator's credibility. As to all of this, we can assume the judge knows but the petitioner does not--and the record cannot tell him, or any appellate court.

The findings, if they can be deemed such, do not meet the "clearly erroneous" test to be applied. U.S. v Tallman, CA Ill 1971, 437 F2d 1103.

Relevant evidence must be provided from which the judge must determine to be adequate and sufficient to support the conclusion of guilt beyond a reasonable doubt. U.S. v Austin, CA Miss 1978, 585 F2d 127; U.S. v Grindstaff, DC Tenn 1978, 479 FSupp 599.

Here, the District Court Judge failed to make findings of fact. This is required in criminal as well as civil trials. It, that is, findings were more so necessary as to each of the elements that the court determined were "all of the acts necessary". Counsel for Frans drew in issue the matter of venue,

jurisdiction, transportation, and the sufficiency of the evidence to establish the existence of a conspiracy in making his motion for judgment of acquittal. Such required findings were required by the court in making his determination of guilt such that the court below and the court know the reasoning and the basis for the decision effecting the liberty of Frans.

This court should review the manner in which the disposition of Frans was made at the close of the trial.

> The Court: "All right. Well, I am not going to belabor anything here. The evidence is overwhelming that the defendant committed all the acts necessary, and the conspiracy is proven beyond any questionable doubt. I find and adjudge the defendant guilty of the offense charged in the indictment. Now, what's your pleasure as to the sentencing here? Is Mr. Frans going to testify in the Arrajj trial?"

If the trial judge had complied, instead of merely pronouncing defendant guilty as charged, he would have recognized the deficiency in proof as to the elements. This court, and the court below, will not know the precise reasons for the decision. The court below did not feel it should belabor anything, obviously meaning the findings of fact on the issues drawn. The trial judge did not make any fact findings covering the trial court's steps with a degree of specificity traditionally necessary to disclose the basis for his critical determination and to aid in possible review.

As stated by the Supreme Court, "there must be findings stated either in the court's opinion or separately which are sufficient to indicate the factual basis for the ultimate conclusion." Kelley v Everglades Drainage District, 1943, 319 US 415, 422; 63 SCt 1141, 1144; 87 LEd 1485. The case cited was civil in nature but a like rule applies

to criminal cases. The findings should be made at a level of specificity which will disclose the reviewing court, as here, the choices made between competing factual premises at the critical points that control the ultimate conclusions of fact. The findings should disclose the choice which was made so that the court below, and here, may test the validity of its evidentiary support.

Respondent debunks petitioner's contention, and the lower court accepts, that the court's announced judgment that the "conspiracy is proven beyond any questionable doubt" is not legally sufficient by making the following statement:

> "It is the government's contention that it is very improbable that a district judge is ignorant as to the proper standard of proof required in a criminal case."

We are not engaged in the delving into of any consideration of the intelligence of the district judge. We are, likewise, not

engaged in a diagnostic determination as to whether the district judge was impressing himself that the reasonable doubt test had "intensely serious consequences." How did the Seventh Circuit Court devise a method to determine that these consequences were assumed to be impressed upon the mind of the judge? How can any court reasonably or logically determine that the trial record is satisfied as to petitions based upon the unfounded premise of what the judge should know in his mind. The Constitutional standard that, therefore, it matters little what form of words he uses to describe his mental processes, that never reach the record. The court below, in another case, has stated that where articulation of the law is essential to the trial's propriety, such task cannot be avoided, as difficult as it may be. U.S. v Barclay, CA Ill, 1977, 560 F2d 812. Of course, a judge does not instruct himself on the law, but that should not diminish the necessity to articulate

constitutional standards on the record. We are not engaged in semantics. Petitioner is desirous of an explanation for the askance-like disposition of due process rights made by the court. It is not difficult to entertain reasoning to the effect that the entire trial was but an exercise of some motion awaiting the already determined, inevitable judgment. How else can the petitioner interpret the statements made by the district judge? The lower court, for this perception, states in a footnote that such a statement made in the reply brief was a serious allegation which is not supported by any evidence. Is there a deterrent on appellate counsel to make these perceptions from the record?

Assuming argunedo that the district judge had adjudicated or pre-adjudicated (prior to his general finding on the record) the patent guilt of petitioner Frans, can same be wholly immaterial to this court's consideration of the adequacy of the trial court's protection

of Frans' constitutional rights. U.S. v Vida, CA Mich 1966, 370 F2d 759, cert den 87 SCt 1695, 387 US 910, 18 LEd2d 630.

For reviewing this matter, the court below was given notice that the district judge had a unilateral representation made to him--from another jury tried co-conspirator (later trial) that this petitioner would testify for him and used such a representation as grounds for his motion for severance.

Prior to trial by court in Frans, the district court judge took up the matter of severance of the case of petitioner from the case of a co-conspirator. By virtue of the required showing necessary to the granting of an order of severance, the district trial judge was aware and became knowledgeable of that exculpatory evidence promised to be testified to in the severed case. Petitioner under these circumstances was denied due process of trial. The trial judge became aware of facts prior to trial that could not

permit him to sit fairly and impartially as a tribunal even if he was admonishing and cautioning himself not to use the information obtained in severance motion. The severance of trials contemplated that petitioner would testify for a co-conspirator presided over by the same judge as would preside over petitioner's case. The trial judge under these circumstances should have chosen one of the following optional procedures:

1. Disqualified himself from presiding over petitioner's case.
2. Denied severance.
3. Ordered a jury trial.

Had petitioner testified for alleged co-conspirator, James Arrajj, on trial (jury), subsequent to petitioner's trial, and he did in fact exculpate Arrajj, then no conspiracy could be shown or proved.

The judge, as an important consideration for severance, before trial knew of the

availability of exculpatory testimony of petitioner at whose trial he would preside. U.S. v Henderson (7th Cir 1972), 417 F2d 204, 206.

The record is not clear as to why the district judge was "not very pleased with the way the severance situation was handled." Was the judge influenced with respect to the guilt or innocence of Frans by virtue of the severance issue?

In the case of Haywood v U.S., 1968 CA5 Ga 393 F2d 780, later app (CA5 Ga), 411 F2d 555, a case tried without jury, the judge stated from the bench:

> "I am going to adjudicate him guilty...and there are two offenses that I can find him on..."

The court ruled in Haywood that this is inadequate under Rule 23(c) when measured by any reasonable standard.

**2. The court below erred in disregarding the rule, and traditional requirement, that the trier of the facts must make a specific finding, on the record, of the proof of venue; and general findings on the record as to each separate element of the crime of conspiracy as charged.**

Review of the void of any finding as to venue, evident by the record, is necessary. The issue goes to jurisdiction and to essence of the charge made.

The brief, but short, argument made by petitioner's counsel after respondent rested its case was, in fact, a request for special findings of fact on special issues, namely:

1. Whether or not venue had been established.

2. Whether or not there was an existence of a conspiracy involving Frans in transporting something in interestate commerce.

3. Whether or not there were such overt acts in relation to transportation in interstate commerce as would give it federal jurisdiction.

The motion for judgment of acquittal is in itself, and by its nature and context, a request for specific findings on the above issues. A motion for judgment of acquittal need not be in writing. Made as a motion it represents a challenge to Government in the presence of the court that the Government has failed in its proof and the same does not require specification of the grounds therefore. U.S. v Cox, CA Mich 1979, 593, 263 F2d 594. It is a request of the court to respond respond on the issues. Instead of responding on the record as to the motion, the court simply said, "All right. Well, I am not going to belabor anything here." and effectually dismissed the importance of the motion issues.

Petitioner says it was error for the trial judge not to find facts specially on his motion for judgment of acquittal, and by reason thereof, such failure and/or refusal requires a review. U.S. v Morris, 1959, CA7, Ill, 263 F2d 594.

Findings were required under the circumstances on the special issues brought before the district judge so that the same would cast light upon his reasoning. The trial court could not, as condoned by the lower court, in the instant matter, treat this as a trivial matter. It involves general justice and reflects constitutional interests affecting an appeal Frans had as of right. It is, as noted in U.S. v Snow, 1973, 15 App DC 331, 484 F2d 811, an important element of fairness and an important element of judicial administration because the appellate court must be able to ascertain grounds for the lower court's decision. U.S. v Silverman, 1979, MD Fla, 464 FSupp 866.

FRCP 23(c) does not specify standard of appellate review, however, "clearly erroneous" test has been consistently applied to findings of fact in criminal cases, as well as civil proceedings, particularly where findings relate to matters other than ultimate judgment

of guilt and are in response to such questions relating to venue, occurrence of theft, and transportation in interstate commerce and specific intent to commit substantive offense as propounded in this case. U.S. v Jabara, 1981, CA Mich, 644 F2d 574; U.S. v Dayton, 1979, CA5 Tex, 604 F2d 931, cert den 445 US 904, 63 LEd 2d 320. There is a division of authority with respect to Rule 23(c) as the Rule does not state effect which must be given findings in a trial court--particularly with regard to the ultimate finding of guilt. U.S. v Tallman, 1971, CA7, Ill, 437 F2d 1103.

Petitioner does not concede to Government and lower court's technical construction of Rule 23(c) relating to special request for findings. While ordinarily, petitioner Frans, by his trial attorney, should have requested the court to find facts specially in order to raise special issues on appeal, his non-compliance (if Frans is so assessed) with Rule 23(c) does not foreclose him from raising

points on appeal, or here, where district judge, as here, fails to recognize charge and its essential elements since such failure is plain error. U.S. v Milton, 1970, CA10 Okla, 421 F2d 586.

On the motion for judgment of acquittal, lack of venue was properly argued since proof of venue is an essential part of the Government's case, even though this court has not deemed venue an essential fact constituting the offense charged, and need only be proved by preponderance of evidence. U.S. v McDonough, CA7 Ill 1979, 603 F2d 19. If venue is not proved by a preponderance of the evidence, the case is incomplete and defendant must go free. U.S. v Toomey, DC NY 1975, 404 FSupp 1377. Here, there was no proof.

Since the burden of proof is upon the Government, was Frans not entitled to a finding in that regard upon his motion? This court should say "Yes" upon review.

If specific intent is necessary to be proved as to the commission of the substantive crime, and the burden of proof is upon the Government, was Frans not entitled to a finding in that regard upon his motion?

It is pointed out in Rule 23(c) that the request for findings must be made prior to the making of general findings. In trial propriety, how is this done? Are the words, "I request special findings" the magic linchpin or does it not suffice to make a motion and allude to the issues petitioner desires to have the court rule upon? This court has no way to determine the grounds and the reasons the district judge used in coming to his conclusion of guilt beyond any questionable doubt.

Courts have held that one does not have a constitutional right to an appeal but, assuredly, if he does in fact appeal, he is entitled to present to the reviewing court the findings and the reasons going to the

basis of the ultimate judgment. Frans was not granted that minimum entitlement. On the basis of the record in this regard, this court should review the judgment of the lower court.

**3. The lower court erred in determining that sufficient competent evidence was produced at the trial to prove a conspiracy.**

This court will note on review permitted that the declarations of the immunized, alleged co-conspirator were used against Frans before there was any connection of Frans to any conspiracy.

There is no showing that Frans had a specific intent to violate the substantive statute. There is no showing that there was transportation in interstate commerce. U.S. v Priesler CA NC 1979, 610 F2d 1206. Venue is not shown by a preponderance of evidence. Where was the plan conceived? When was it agreed upon? Was it in Michigan or Wisconsin, if any such plan was so conceived and agreed upon? As to transportation to Detroit, what

overt act in that regard was shown by the conduct of Frans? The burden was strictly upon the prosecution and it was not met. U.S. v White, CA Fla 1980, 611 F2d 581. The strongest, if any, evidence used against Frans is that of Kilmer. His statements are inadmissible to prove the truth of the matter asserted. Their admission is reversible error and requires a review. U.S. v Eisenberg, CA NY 1979, 596 F2d 522.

Evidence may be "overwhelming" and yet not prove beyond a reasonable doubt every essential element of the crime of conspiracy, let alone connecting the petitioner with it. The unfortunate language used by the trial judge that the petitioner, to-wit: "committed all the acts necessary and the conspiracy is proven beyond any questionable doubt" is conjunctive and pointedly vague phraseology. It leaves one to guess application and interpretation. That indicates plain error. Firstly, it is not shown and it is not accepted, if

shown, that "acts necessary" are synonymous with "essential elements." There is no finding of the "acts" of Frans with any relationship to the "essential elements" of conspiracy. The adjudication of guilt that follows requires mental, but not otherwise noted, reference to the indictment.

No conviction for conspiracy can be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute. U.S. v Mora, CA Puerto Rico, 1979, 598 F2d 682. Is the specific intent an "act" or an "element"?

Assuming that it is not necessary for the Government to prove the essential elements of the substantive crime (18 USC Sec. 2314) beyond a reasonable doubt that defendants (1) transported in interstate commerce (2) stolen goods (3) worth Five Thousand Dollars ($5,000.00) or more (4) knowing at the time of transportation that the goods were stolen;

nevertheless, it is necessary for the government to prove beyond a reasonable doubt the specific intent to violate the substantive statute as to all of its essential elements. U.S. v Rose, 1978 CA7 Ill, 590 F2d 232; U.S. v Calabrese, CA10 Utah, 645 F2d 1379.

If the scheme charged as having been devised involves transportation in interstate commerce--such transportation must actually occur. There must be the requisite proof of the specific intent to transport in interstate commerce as an essential ingredient of the substantive crime charged. U.S. v Poole, 1977 CA5 La, 557 F2d 531. U.S. v Malatesta, CA Fla 1979, 590 F2d 1379.

A careful reading of the proofs indicate that all the attempts of Kilmer to elicit from Frans where the shipment was going derived nothing. Kilmer questions "Detroit?" and gets no answer that it was Detroit. He inquires about the man from Detroit, and still he cannot get any statement about a shipment going

to Detroit. Kilmer inquires: "Your man through Detroit, does he know your headin' up today? Frans answers "Yeah." Kilmer learns that Frans does not know if they are going right into Detroit. Frans states he will find out. Frans' friend is in Detroit. Kilmer was unable to elicit where, if any place, the shipment was going. Kilmer tried to put destination on his body tape and learned that when Frans gets the truck "this guy" was going to meet Frans in Milwaukee. Interstate is not proved.

There can be no doubt that Kilmer was a government informer. His object after lessons from government agents was to frustrate the alleged conspiracy. He kept his purpose secret from Frans. It is the law that there can be no conspiracy that can be indictable with a government informer who secretly intends to frustrate the conspiracy. U.S. v Moss, CA Mo 1979, 591 F2d 428.

## CONCLUSION

Petitioner's application for certiorari should be granted.

Dated: Iron River, Michigan, June 5, 1983

Respectfully submitted,

THEODORE G. ALBERT
Attorney for Petitioner

# APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 82-1506

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

HARRY RONALD FRANS,

*Defendant-Appellant.*

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No. 82-1507

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

JAMES J. ARRAJJ, JR.,

*Defendant-Appellant.*

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Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 81 CR 150—**Terence T. Evans**, *Judge.*

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ARGUED OCTOBER 28, 1982—DECIDED JANUARY 6, 1983

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Before BAUER, *Circuit Judge*, POSNER, *Circuit Judge*, and WISDOM, *Senior Circuit Judge.**

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* The Honorable John Minor Wisdom, Senior Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

BAUER, *Circuit Judge.* Defendants Harry Frans and James Arrajj, Jr. were arrested in September 1981 in West Milwaukee, Wisconsin, and charged with conspiracy to transport stolen goods in interstate commerce. 18 U.S.C. § 371 (1948).

Frans was convicted after a one-day bench trial and sentenced to fifteen months imprisonment. He appeals his conviction on the grounds that the government's evidence of a conspiracy was insufficient and that the trial judge's findings were legally faulty.

Immediately after Frans' trial, Arrajj was tried, convicted by a jury, and sentenced by the same judge to fifteen months imprisonment. He claims now that the government wrongfully refused to grant immunity to Frans so that Frans would testify on Arrajj's behalf. Arrajj also argues that the government did not prove that Arrajj knew of a conspiracy.

We affirm both judgments of conviction.

## I. Facts

The Federal Bureau of Investigation learned from an informant that Daryl Kilmer and Defendant Frans planned to steal electric motors from a warehouse in West Milwaukee. Kilmer had second thoughts about committing the crime, so he contacted the FBI and agreed to cooperate with federal agents. Kilmer was outfitted with a tape recorder and microphones on the morning of the planned theft. Then, Kilmer met Frans and drove to the warehouse, where they began preparations for the theft. Their conversation during this time was recorded. Arrajj arrived at the warehouse at approximately 4:30 p.m. He broke into a locked storage area, and the three men moved electric motors from that storage area to the center of the warehouse floor. As the trio was leaving the warehouse at 5:30 p.m. to get vehicles to transport the electric motors, they were arrested by FBI agents who had hidden in the warehouse.

## II. Arrajj's Claims

### A. *Sufficiency of the Evidence*

Defendant Arrajj argues that the government did not prove that he participated in the conspiracy. He claims ignorance of any impending crime, asserting that when he arrived at the warehouse and discovered what was transpiring, he merely acquiesced in the acts performed by Kilmer and Frans. The defendant correctly notes that proof of knowing membership is necessary for a conspiracy conviction, *United States v. Garza-Hernandez*, 623 F.2d 496, 501 (7th Cir. 1980). He contends that the government failed in its proof of this element.

We will not disturb the jury's verdict if it is supported by substantial evidence. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Santiago*, 582 F.2d 1128, 1130 (7th Cir. 1978). The evidence presented here through the testimony of government witnesses and the tape recording transcript amply supports the government's charge that the defendant actively conspired to steal the motors.[1] Therefore, this challenge fails.

### B. *Government Refusal to Grant Immunity*

At his trial, Defendant Arrajj called Frans, who had been convicted the previous day, but Frans pleaded the

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[1] The transcript of the taped conversation between Kilmer and Frans after they arrived at the warehouse revealed that they anticipated Arrajj's arrival. Moreover, the conversation after Arrajj arrived indicated that Arrajj had been aware of what was going on before he had arrived, and that he had come prepared to assist in the crime. Additionally, Kilmer's testimony implicated Arrajj in the conspiracy.

A party need not know all of the purposes and details of a conspiracy to be proved a co-conspirator. *United States v. Escalante*, 637 F.2d 1197, 1200 (9th Cir. 1980); *United States v. Bastone*, 526 F.2d 971, 981 (7th Cir. 1975), *cert. denied*, 425 U.S. 937 (1976). It is sufficient that the government prove a connection between the defendant and the conspiracy. *See, e.g., United States v. Dalzotto*, 603 F.2d 642, 645 (7th Cir.), *cert. denied sub nom., Young v. United States*, 444 U.S. 994 (1979).

fifth amendment privilege against self-incrimination and refused to answer any questions regarding the conspiracy. Arrajj's attorney asked the government to immunize Frans' testimony, but the government refused. At the same time, the government used Daryl Kilmer as a primary witness against Arrajj. Kilmer was granted immunity from prosecution in exchange for his cooperation with the FBI and prosecutors. Now, Arrajj claims that the government's refusal to immunize Frans was an abuse of its discretion. Arrajj urges this court to reverse his conviction because the government should not be allowed to rely on immunized testimony to support its case, and refuse, for no apparent reason, to immunize a witness allegedly favorable to the defendant. The circumstances of this case, however, do not require reversal.

Generally, "a district court is powerless to direct the government to seek use immunity in order to secure testimony which the defense deems relevant, *United States v. Allstate Mortgage Corporation*, 507 F.2d 492, 494 (7th Cir. 1974), in circumstances where . . . the defense witness exercises his privilege against self-incrimination." *United States v. Smith*, 542 F.2d 711, 715 (7th Cir. 1976). *See United States v. Bounos*, 693 F.2d 38, 39 (7th Cir. 1982). Congress has conferred that power exclusively upon the executive branch, not the judiciary. 18 U.S.C. § 6003 (1970). Moreover, the immunity statutes and their legislative history indicate that the provisions were not designed to benefit defendants. *See United States v. Herman*, 589 F.2d 1191, 1202-03 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979) (federal court has no power to review prosecutorial decision not to immunize defense witness).

In this case, the trial judge recognized that he had no authority to request immunity. *See, e.g., In re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1094-95 (5th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). The government apparently felt that it would gain nothing, and would hinder future actions, by immunizing Frans.

This court has held consistently that it will not review a prosecutor's immunization decisions. *In re Perlin*, 589

F.2d 260, 269 (7th Cir. 1978); *Smith, supra; United States v. Rauhoff*, 525 F.2d 1170, 1178 (7th Cir. 1975); *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975). Nevertheless, the defendant argues that his constitutional rights were violated, and we have implied that review may be proper if there is a clear abuse of discretion violating the due process clause. *In re Perlin, supra.* The facts here do not demonstrate such a violation.

The defendant did not attempt to show any bad motives of the government at trial, and has not shown any on appeal. We agree with the Third Circuit that a defendant must make a substantial evidentiary showing that the government intended to distort the judicial fact-finding process before we will depart from the strong tradition of deference to prosecutorial discretion. *Herman*, 589 F.2d at 1203-04.[2] No such showing was accomplished here. Our holding in *Smith*, 542 F.2d at 715, applies to defeat Defendant Arrajj's argument.[3]

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[2] *See generally United States v. Nixon*, 418 U.S. 683, 693 (1974) (executive branch has absolute discretion to decide whether to prosecute a case).

[3] Defendant Arrajj raises one other ground on this appeal. The trial court, on the government's motion to reconsider, reversed its order enforcing a magistrate's decision to compel disclosure of the government's confidential informant. The defendant claims this was error because the magistrate's determination was neither clearly erroneous nor contrary to law. 28 U.S.C. § 636(b)(1)(A) (1979). These standards, however, do not necessarily restrict district court review of a magistrate's findings. A magistrate makes recommendations to the district court. That court then may satisfy itself that the recommended actions are fair and proper by receiving additional evidence or conducting a full review. *See, e.g., United States v. Raddatz*, 447 U.S. 667, 673-76 (1980); *United States v. Southern Tanks, Inc.*, 619 F.2d 54, 55-56 (10th Cir. 1980); *Muhich v. Allen*, 603 F.2d 1247, 1251 (7th Cir. 1979).

## III. Frans' Claims

### A. *Sufficiency of the Evidence*

Defendant Frans argues that the government did not prove that he participated in the conspiracy because the evidence did not show either that he had "specific intent" to violate the law or that the goods were transported in interstate commerce.

First, a conspiracy consists of a confederation of two or more persons formed to commit a criminal act. The essential elements of the offense are: (1) an agreement; (2) an overt act in furtherance of the conspiracy; and (3) knowledge of the conspiratorial purpose. *United States v. Hedman*, 630 F.2d 1184, 1192 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). The facts detailed above proved the first two elements. Additionally, the government's evidence indicated not only that Frans knew of the plans to steal the electric motors and ship them to other states, but also that he acted as the ringleader in making many of the plans. The government's evidence was substantial on each element of the offense.

Second, the government need not prove interstate transportation of the stolen goods to support a conspiracy conviction. The crime of conspiracy involves an agreement to violate the law, not accomplishment of the violation. *United States v. Donner*, 497 F.2d 184, 190 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974).

### B. *Legal Sufficiency of Trial Court Finding*

At the close of Frans' trial, the court stated: "All right. Well, I'm not going to belabor anything here. The evidence is overwhelming that the defendant committed all the acts necessary, and the conspiracy is proven beyond any questionable doubt. I find and adjudge the defendant guilty of the offense charged in the indictment." Tr. at 109. The defendant claims that the phrase "beyond any questionable doubt" renders this court incapable of

deciding whether the judge deviated from the required standard of proof "beyond a reasonable doubt."[4]

The prosecution bears the burden of proving each element of an offense beyond a reasonable doubt. *Moore v. United States*, 429 U.S. 20, 22 (1976). In this bench trial, the judge was charged with applying that standard when scrutinizing the evidence. Notably, the defendant stressed during oral argument that he was not accusing the trial judge of misapplying the law. Rather, the complaint is that this court cannot properly review a judgment "beyond any questionable doubt." Despite this reasoning, we already have decided that substantial evidence to convict supports each element of the offense.

The trial judge regrettably used the word "questionable" in his ruling. However, he also ruled that the evidence on each element was "overwhelming." The defendant has not indicated that the wrong standard was applied; he quarrels only with the words spoken. We should not allow this case to hinge on that single word. *De minimis non curat lex.* Although the phrase "beyond a reasonable doubt" is an important indicator of a constitutionally required standard, the trial judge here was not duty-bound to express it aloud in his finding that the government succeeded overwhelmingly in proving its case.

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[4] Defendant Frans also suggests in his Reply brief that the trial judge had decided on a verdict of guilt before the trial even began. The defendant wrote, in part: "It is not difficult to entertain reasoning to the effect that the entire trial was but an exercise of some motion awaiting the already-determined inevitable judgment. How else can the appellant interpret the statements made by the district judge?" Frans' Reply br. at 8. This is a serious allegation which is not supported by any evidence.

## IV. Conclusion

In summary, substantial evidence supports the convictions in both cases. The government did not abuse its discretion when it refused to grant immunity to Frans so that Arrajj could use Frans' testimony, and neither the trial court nor this court has direct or indirect power to immunize witnesses. Finally, the trial judge's finding of Frans' guilt was legally sufficient. Accordingly, the judgments are affirmed.

AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 5, 1983

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff-Appellee, | ) | Appeal from the United States District Court for the Eastern District of Wisconsin |
| No. 82-1506 vs. | ) | No. 81 CR 150 |
| HARRY RONALD FRANS, | ) | Terence T. Evans, Judge |
| Defendant-Appellant. | ) | |

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendant-Appellant Harry Ronald Frans, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*/ The Hon. John Minor Wisdom, Senior Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

# APPENDIX C

Title 28 Sec. 1651

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"

# APPENDIX D

United States Constitution, Fourteenth Amendment

"No person shall....be deprived of life, liberty, or property, without due process of law..."

# APPENDIX E

Title 18 USC Sec. 371

"If two or more persons conspire either to committ any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

# APPENDIX F

Title 18 USC Sec. 2314

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud...

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."